

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

PRINCEWILL TATA, #1001953	§	
	§	
V.	§	CIVIL ACTION NO. G-03-367
	§	
SGT. K. FERRY, ET AL.	§	

ORDER OF DISMISSAL

Before the Court for its Order of Acceptance is a Report and Recommendation of the United States Magistrate Judge, entered on July 20, 2005, which recommends that the instant case be dismissed with prejudice. Plaintiff has filed objections to the Report and Recommendation, stating that he did, in fact, file a response to Defendants Motion for Summary Judgment; he was injured as a result of an excessive use of force; and, he was found not guilty on all charges surrounding the spitting incident alleged by Defendants.

Regarding Plaintiff's assertion that he filed a Response to Defendants' Motion for Summary Judgment, Plaintiff filed only a "Motion for Summary Judgment" over one month prior to the date that Defendants filed a Motion for Summary Judgment. Therefore, it is impossible for Plaintiff's alleged Response to be construed as a Response to Defendants' Motion for Summary Judgment. Moreover, Plaintiff's claims were reviewed and evaluated on the merits; the Magistrate Judge has not recommended that they be summarily dismissed.

With respect to Plaintiff's objections regarding his alleged injuries and reasonableness of force, the Magistrate Judge correctly reviewed these claims and the Court agrees with his assessment. Plaintiff's claims, even if true, fail to rise to the level of a constitutional violation and fail to surmount Defendant's entitlement to qualified immunity.

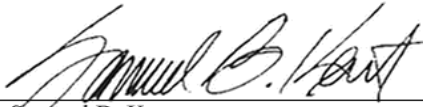
Regarding Plaintiff's objection that he was found not guilty of all charges of spitting, there is no evidence that Plaintiff ever received a disciplinary case for spitting, or that he was ever found guilty of the incident. Plaintiff has had over four years in which to plead this allegation and provide evidence, thereof, yet he has not, until the instant objections, ever made reference to such a claim. The Court will not now allow new, unsupported allegations to be introduced at this late stage.

After *de novo* review pursuant to 28 U.S.C. §636 (b)(1)(C), this Court is of the opinion that the Report and Recommendation of the Magistrate Judge should be, and it is hereby, **ACCEPTED** in its entirety and incorporated by reference herein. It is the **ORDER** of this Court that Defendant's Motion for Summary Judgment is **GRANTED** and this cause is **DISMISSED with prejudice for failure to state a claim for which relief can be granted and as frivolous**.

This Order **DOES NOT** release Plaintiff or the Texas Department of Criminal Justice - Institutional Division from the obligation to pay the filing fee previously imposed. Plaintiff is advised that if he appeals this dismissal, he will be required to pay the appeal fee of **\$255.00** pursuant to the Prison Litigation Reform Act, and he must submit a 6-month certificate of his inmate trust account when he files his notice of appeal.

A certified copy of this Order shall be mailed to: **TDCJ-Office of the General Counsel**, P.O. Box 13084, Austin, Texas, 78711; and, to **TDCJ Local Funds Division**, P.O. Box 629, Huntsville, TX 77342-0629.

DONE at Galveston, Texas, this the 26th day of August, 2005.



Samuel B. Kent
United States District Judge